

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 6863 of 2006****For Approval and Signature:****HONOURABLE MR.JUSTICE P.B.MAJMUDAR**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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PATEL GANGARAM AMRABHAI**Versus****THAKORE HEMJIBHAI KHEMABHAI AND OTHERS**

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Appearance :

MR ABHAYKUMAR P SHAH for Petitioner.

MR PREMAL R JOSHI for Respondent No. 1.

RULE SERVED BY DS for Respondent Nos. 2 - 6.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR**Date : 04/05/2006****ORAL JUDGMENT**

Mr.Premal Joshi, learned advocate states that he has received instruction to appear for all the respondents in this matter.

2. By filing this petition, the petitioner has challenged the order passed by learned Additional District Judge, Banaskantha at Deesa dated 18-1-2006 by which the learned Judge has not condoned delay of about 43 days in filing appeal, which is filed under Order 43 of Civil Procedure Code. The petitioner herein is the original plaintiff of Regular Civil Suit No.47/2000. Said suit is filed for permanent injunction restraining the defendants from disturbing the possession of the plaintiff.

3. Learned trial Judge dismissed the said suit, against which the petitioner – original plaintiff has filed Regular Civil Appeal before the District Court. However, since there was a delay of about 43 days in filing such appeal, an application for condonation of delay was preferred under Section 5 of the Limitation Act. The ground which was pressed into service for condonation of delay was that the applicant before the District Court was not keeping good health and he was suffering from severe back pain, for which he had also submitted a certificate of Orthopedic Doctor dated 14-9-2005, and he was advised to take rest for a period of two months.

4. Learned appellate Judge, however, rejected the said application by observing that the petitioner has not produced any X-ray reports with regard to the condition of his spinal cord. Learned appellate Judge accordingly found that the certificate produced by the petitioner is a got up one and on that ground delay in filing appeal is not condoned, against which the petitioner has preferred this Special Civil Application by invoking extra-ordinary jurisdiction of this Court.

5. Mr.A.P.Shah, learned advocate for the petitioner vehemently submitted that the petitioner had already produced a certificate of the doctor by which he was advised to take two months rest as he was having trouble in his spinal cord. He further submitted that since the petitioner was advised to take complete rest, learned Judge should have condoned the delay of 43 days in filing appeal. It is also submitted by him that simply because the certificate is not produced along with the application and since it is produced after filing of application, is no ground for doubting the genuineness of the medical certificate.

6. On the other hand, Mr.Desai, learned advocate for the respondent tried to support the order of the appellate Court and submitted that this Court may not interfere with such a discretionary order. He further submitted that in any case if the Court decides to condone the delay, some cost may be awarded to the respondent.

7. After reading the order of the learned appellate Judge, I am of the view that said order is not sustainable at all. The learned appellate Judge has not given any positive finding to the effect that the medical certificate produced by the petitioner is false or concocted. Simply because the certificate is produced at the time of hearing of application is no ground for rejecting the application for condonation of delay. In my view, the learned Judge has acceded his jurisdiction by observing in the order that X-ray report is not produced on record, as it is not even the case of the petitioner that any X-ray was taken by doctor and the case of the petitioner was that he was advised to take rest for two months.

8. In support of his contentions, Mr.A.B.Shah, learned advocate for

the petitioner has relied upon the decision of Division Bench of this Court in Special Land Acquisition Officer v. Lilavatiben Kodar Ranchhod and Others, reported in XLIII (3) GLR 1874, wherein it is observed as under paragraphs 6 and 7 :

“6. Apart from that, the legal proposition insofar as the delay condonation jurisprudence is concerned, has been extensively explored and very well enunciated by catena of judicial pronouncements. Obviously, willful indifferent person cannot be helped by the Court of law when he seeks the justice for condonation of delay. Nevertheless, if the record discloses that the parties in a given case, though delay has occasioned, had not abandoned animus to question the impugned order, decision or judgment, is an important factor which should be taken into consideration for determining the genuineness and sufficiency of the ground for condonation of delay. As noticed hereinabove in this group of matters, the certified copies came to be applied for, on the same day, when the impugned common award came to be recorded by the Reference Court under Section 18 of the Act. It speaks volumes about the animus of not to accept the common award of the Reference Court. On the contrary, it is reported and spelt out from record that animus and manifestation on the part of the department to carry it further and challenge in the higher forum. This aspect is itself weighty in the process of decision making when a question is raised under Section 5 of the Limitation Act, 1963.

7. Apart from that the ultimate anxiety of the Court while dealing with an application of condonation of delay has been, to see that ordinarily no meritorious matter is thrown over board on the technical grounds of delay. The purpose and design incorporating the provisions of Section 5 of the Limitation Act is to see that ordinarily a substantial justice is required to be given and ordinarily, unless there are circumstances running counter to the spirit of the provision of section 5, the meritorious matters are required to be dealt with and adjudicated upon on merits. It is rightly

said that no party or person would stand benefitted by filing appeal or application late without any reason ordinarily when he has made up his mind to challenge the impugned order, award, judgment or decision, as the case may be. There cannot be such presumption also. This proposition of law is also very well settled since long. Therefore, while dealing with an application for condonation of delay, one cannot start with presumption that party did not intend to question it. On the contrary, the presumption may be other way round. Whereas in the present case it is manifested in the application that the certified copy of the impugned common award was applied for on the same day when the Reference Court finalized the matters. Therefore, the contention that delay cannot be condoned in this group of matters is unsustainable and unacceptable.”

9. In the instant case, as stated herein above, the petitioner has already produced medical certificate with regard to the condition of his spinal cord. In my view, learned Judge has not exercised his discretion in a proper judicious manner and the impugned order has resulted into miscarriage of justice, as the Regular Civil Appeal filed by the petitioner cannot be decided on merits.

10. In view of above, this petition is allowed. Order passed by the learned appellate Judge is quashed and set aside. Delay of one month and thirteen days in filing Regular Civil Appeal is condoned. Registry of the District Court shall now give appropriate number to the appeal and, thereafter, said appeal may be decided on merits and in accordance with law. However, the petitioner is directed to pay cost of Rs.1,000/- to the respondent. Amount of cost may be deposited before the District Court within a period of two weeks from today and on such deposit, the other side will be at liberty to withdraw said amount unconditionally.

11. Accordingly, this petition is allowed. Rule is made absolute with cost, as quantified herein above.

(P.B.MAJMUDAR, J.)

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